83-942

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No.

IN THE

Supreme Court of the United States

October Term, 1983

RIPLEY COUNTY AREA PLAN COMMISSION,

Petitioner

vs.

MELVIN ROUSE, RALPH D. AILES, ELIZABETH J. AILES, DECATUR COUNTY AREA PLANNING COMMISSION,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTION PRESENTED FOR REVIEW

Whether amortization, as a means to phase out pre-existing lawful uses rendered non-conforming by a zoning ordinance, is *per se* a taking of property without due process of law under the Fourteenth Amendment to the United States Constitution.

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MELVIN ROUSE, RALPH D. AILES, ELIZABETH J. AILES, DECATUR COUNTY AREA PLANNING COMMISSION,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

The petitioner Ripley County Area Plan Commission respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Indiana entered in this proceeding on May 12, 1983.

QUESTION PRESENTED FOR REVIEW

Whether amortization, as a means to phase out pre-existing lawful uses rendered nonconforming by a zoning ordinance, is *per se* a taking of property without due process of law under the Fourteenth Amendment to the United States Constitution.

PARTIES

All parties are identified in the caption.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana in the consolidated appeal of *Ailes v. Decatur County Area Planning Commission et al.* is printed at Appendix A hereto, p. A-1, *infra*, and is reported at 448 N.E.2d 1057 (1983). The opinion of the Court of Appeals of Indiana in *Ailes v. Decatur County Area Planning Commission et al.* is printed at Appendix C hereto, p. C-1, *infra*, and is reported at 437 N.E.2d 1375 (1982). The judgment of the Ripley Circuit Court in *Ripley County Area Plan Commission v. Melvin T. Rouse* was not reported but is printed at Appendix D hereto, p. D-1, *infra*. The order of the Ripley Circuit Court on the Motion For Relief From Judgment in *Ripley County Area Plan Commission v. Melvin T. Rouse* was not reported but is printed at Appendix E hereto, p. E-1, *infra*. The order on the Motion to Correct Errors in *Ripley County Area Plan Commission v. Melvin T. Rouse* was not reported but is printed at Appendix F hereto, p. F-1, *infra*.

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on May 12, 1983. A timely petition for rehearing was denied on August 4, 1983. On October 21, 1983,

petitioner applied for an extension of time to file this petition and on October 24, 1983, Mr. Justice Stevens extended the time to file this petition until December 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

Fourteenth Amendment to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ripley County Zoning Ordinance of 1970, Section 3.5(g):

> "The lawful use of a building or premises existing at the time of passage of the ordinance, may be continued although such use does not conform to all the provisions of this ordinance or amendments to this ordinance except as hereinafter provided."
>
> * * * *
>
> "(g) Any nonconforming open use of land shall be discontinued within five (5) years from the date of passage of this ordinance."

STATEMENT OF THE CASE

The pertinent facts and circumstances surrounding this cause are undisputed. Melvin T. Rouse, one of the respondents herein, owned certain real estate in Ripley County, Indiana which he had utilized as a junkyard since 1953. On June 15, 1970, the county commissioners adopted a zoning ordinance which zoned the district wherein Rouse's property was located for medium density single and two-family residences. Junkyards were prohibited therein. The ordinance contained the familiar language that prior nonconforming uses could continue in existence but specified that any nonconforming open land use must be discontinued within five years from the date of its passage. (R. 2).

On August 23, 1977, the Ripley County Area Plan Commission filed a complaint for injunctive relief against Rouse seeking to enjoin any further use of his property as a junkyard. On August 8, 1978, the Ripley Circuit Court granted the relief requested and ordered Rouse to remove all junked automobiles and junk equipment within ninety days. (R. 3). On September 13, 1980, Rouse filed a motion for relief from judgment pursuant to Ind. Rules of Trial Procedure, Rule 60(B) alleging that the foregoing five year amortization provision was an unconstitutional taking of property without due process of law. (R. 11). The trial court overruled the motion and Rouse sought appellate review raising only the constitutional issue for consideration.[1] (R. 4, 5).

The judgment of the Ripley Circuit Court was affirmed by the Indiana Court of Appeals which ruled that the

[1] It should be noted that the Rouse appeal was consolidated with an appeal brought by Ralph and Elizabeth Ailes who had unsuccessfully challenged a Decatur County amortization ordinance as an unlawful taking of property without due process of law. (App. A-1).

amortization provision at issue was not unconstitutional *per se* as the taking of property without due process of law.[2] (App. C-1) The Supreme Court of Indiana vacated the Court of Appeals decision and held that amortization, in and of itself, is *per se* an unconstitutional taking of property without due process of law.[3] (App. A-1).

> "We hold, however, that an ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as the taking of property without due process of law and an unreasonable exercise of the police power." (App. A-8).

It is from this decision that the petitioner, Ripley County Area Plan Commission, seeks to obtain certiorari review.

REASONS FOR GRANTING THE WRIT

A.

Whether the elimination of nonconforming uses through a gradual amortization of the value of the use constitutes an unlawful taking of property without due process of law under the Fourteenth Amendment is an issue which has never been settled by this Court but it should be. Foremost among the reasons for granting certiorari in this case is that amortization has generally been regarded as the only effective means in zoning for abating nonconforming uses. As a consequence of the Indiana Supreme Court's decision that all amortization provisions are necessarily invalid

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[2] A similar result was reached with respect to the Ailes appeal. (App. A-1).

[3] The Supreme Court of Indiana also reversed the judgment in the Ailes appeal. (App. A-1). However, the appellee therein, the Decatur County Area Planning Commission, has elected not to seek certiorari review in this case.

under the federal Due Process clause,[4] Indiana municipalities have been deprived of a valuable tool for ensuring compliance with comprehensive zoning plans and their ability to displace particularly troublesome nonconforming uses such as junkyards and billboards has been severely hampered.

The significance of the case at bar is further underlined by the fact that it is the only reported decision in this country to strike down amortization *solely* on federal due process grounds. A perusal of those cases which have embraced the minority view that amortization is unconstitutional *per se* reveals that, in each of them, the decision rested on an adequate and independent state grounds thereby evading certiorari review. The instant case is therefore one of first impression in this Court and should be resolved so that local communities may implement reasonable amortization provisions as a way of ridding themselves of nonconforming uses without fear that they are skating on constitutional ice no thicker than a summons.

B.

That the Indiana Supreme Court's decision in this matter will have serious ramifications on the ability of cities and

[4] While the Indiana Supreme Court did not specify whether its decision was premised on the United States Constitution or the Indiana Constitution, a comparison of relevant provisions from each document makes it abundantly clear that only the federal constitution was at issue. The state constitutional provision corresponding to the federal due process clause is Article I, §12 which provides in pertinent part: "[E] very man, for injury done to him in his person, property, or reputation shall have remedy by due *course* of law". (emphasis added).

Certainly the Indiana Supreme Court, being the final arbiter of the state constitution, would not have overlooked the difference in language if it had intended to decide the case on non-federal grounds. It is significant to note that nowhere in the record or in the briefs did respondents Rouse or Ailes cite Article I, §12.

towns to promote orderly community development cannot be doubted when the dilemma posed by nonconforming uses is considered. Early zoning thought discounted the impact of nonconforming uses on the attainment of zoning objectives since it was anticipated that such uses would dwindle and disappear of their own accord. Note, *Zoning And The Amortization of Nonconforming Uses*, 54 N.D.L.R. 231 (1977).

> "[I]t was felt they would be few and likely to be eliminated by the passage of time and restrictions on their expansion. For these reasons and because it was thought that to require immediate cessation would be harsh and unreasonable, a deprivation of rights in property out of proportion to the public benefits to be obtained and, so, unconstitutional, and finally a red flag to property users at a time when strong opposition might have jeopardized the chance of any zoning, most, if not all, zoning ordinances provided that lawful uses existing on the effective date of the law could continue although such uses could not thereafter be begun."

Grant v. Mayor and City Council of Baltimore, (1957) 212 Md. 301, 129 A.2d 363 at 365.

However, contrary to the initial assumptions of zoning advocates, it has become increasingly evident that pre-existing nonconforming uses have no inherent tendency to fade away. Comment, *The Abatement of Pre-existing Nonconforming Uses under Zoning Laws: Amortization*, 57 N.W.U.L.R. 323 (1962). Despite numerous restrictions on change, expansion, resumption and reconstruction, many of these uses have not only continued to exist but have prospered as never before under the artificial monopolies bestowed on them by zoning laws. Rohan, *Zoning and Land Use Controls* §41.04 (1983).

Their continued presence, though, has often exacted a heavy toll on the community at large. In several instances,

nonconforming uses have reduced the effectiveness of zoning, depressed property values and contributed to the growth of urban blight. Comment, *Conforming The Nonconforming Use: Proposed Legislative Relief For A Zoning Dilemma*, 33 S.W.L.J. 855 (1979). An early survey of nonconforming uses in Indiana communities reinforces these conclusions:

> "Over 50 per cent of the nonconforming neighborhood businesses were closely abutted by substandard dwellings. In excess of 30 per cent of the commercial structures were in a state of disrepair or were adjoined by utility or storage "shacks." Inadequate parking and loading facilities leading to traffic congestion, and unwarranted accumulations of junk and trash were also identifying markers of this use. Fifty-nine per cent of the multi-family dwellings had traffic problems which could be traced to inadequate parking space.... Ninety-one per cent of the industries caused traffic congestion, and fifty-five per cent of them contained unnecessary large quantities of waste and junk.... The tendency of adjoining owners to permit their property to fall into disrepair can be traced to these factors."

See, Amortization and Performance Standards in Zoning Regulations: Study of Existing Nonconforming Uses in an Indiana Community, 30 Ind. U.L.R. 521, 524 (1955).

The failure of nonconforming uses to dissipate by natural attrition led to the adoption of amortization as a means for hastening their departure. Essentially, amortization contemplates the compulsory termination of a nonconforming use at the expiration of a specified period of time, which period roughly corresponds to the useful economic life of the nonconformity. *See* Wood, *Zoning Ordinances Requiring The Termination Of A Nonconforming Use*, 1973 Institute on Planning, Zoning and Eminent Domain 23. The theory behind amortization is based on the principle

that a property owner should be given time to recoup his investment in property before he is forced to discontinue the use without compensation. Rohan, *Zoning and Land Use Controls* §41.04 (1983).

The technique of terminating nonconforming uses through amortization has won a fair measure of judicial approval in the United States. See 22 *A.L.R.*3d 1134 and cases cited therein. The leading decision in this area, *City of Los Angeles v. Gage*, (1954) 127 Cal.App.2d 442, 274 P.2d 34, accurately reflects the position taken by the majority of courts which have confronted the issue.

> "The elimination of existing uses within a reasonable time does not amount to a taking of property nor does it necessarily restrict the use of property so that it cannot be used for any reasonable purpose. Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements. As a method of eliminating the existing nonconforming uses it allows the owner of the nonconforming use, by affording an opportunity to make new plans, at least partially to offset any loss he might suffer. The loss he suffers, if any is spread out over a period of years, and he enjoys a monopolistic position by virtue of the zoning ordinance as long as he remains. If the amortization period is reasonable the loss to the owner may be small when compared with the benefit to the public. Nonconforming uses will eventually be eliminated. A legislative body may well conclude that the beneficial effect on the community of the eventual elimination of all nonconforming uses by a reasonable amortization plan more than offsets individual losses."

274 P.2d at 44.

Undoubtedly influenced by the approving nod given to this approach, a substantial number of municipalities have adopted ordinances requiring amortization. According to a

nationwide study conducted in 1971 by the American Society of Planning Officials[5] (hereinafter referred to as the "ASPO report"), appoximately 33% of the 459 communities responding had enacted amortization provisions. Similarly, a recent survey of plan commissions across Indiana (hereinafter referred to as the "Indiana survey") indicates that over 31% of the respondents have amortization regulations in place.[6] Interestingly enough, of those plan commissions without amortization, 51% stated that they would consider its implementation---if the power to amortize were upheld as constitutional.

These figures demonstrate that there is a significant groundswell of support for amortization and underscore the impact of the instant decision on zoning enforcement. The ruling of the Supreme Court of Indiana that all amortization ordinances are *per se* unconstitutional under the Due Process clause of the Fourteenth Amendment necessarily invalidates a common zoning technique for eliminating nonconforming uses. Without it, municipalities are relegated to traditional zoning restrictions on change of use, resumption, increase of size and reconstruction which have largely proven to be unsuccessful.

Put another way, the denial of certiorari in this case would sweep away what has been widely accepted as the only viable means for terminating nonconforming uses. *City of Los Angeles v. Gage*, (1954) 127 Cal.App.2d 442, 274

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[5] Scott, *The Effect of Nonconforming Land-Use Amortization*, American Society of Planning Officials Report No. 280 (1972).

[6] In connection with the preparation of this petition, the Metropolitan Development Commission of Marion County, Indiana mailed questionnaires to over 200 plan commissions in the state, of which there was a 50% rate of return. The purpose of this survey was to determine the extent to which amortization ordinances have been adopted in Indiana as well as to elicit opinions and information based on practical experience on the effectiveness of amortization in dealing with nonconforming uses.

P.2d 34; *Board of Supervisors of Cerro Gordo County v. Miller*, (1969) Ia., 170 N.W.2d 358; *Grant v. Mayor and City Council of Baltimore*, (1957) 212 Md. 301, 129 A.2d 363; *Spurgeon v. Board of Commissioners of Shawnee County*, (1957) 181 Kan. 1008, 317 P.2d 798. According to the results of the Indiana survey, 42% of the plan commissions queried responded that amortization was a very effective means for eliminating nonconforming uses while 29% opined that it was somewhat effective. Turning to the ASPO report, the percentages were evenly distributed between those reporting excellent or good enforcement experience (34%) and those indicating poor experience (33%).[7]

Amortization has been most effective with respect to billboards and open land uses. 4 Rathkopf, *The Law of Zoning and Planning* §51.09(4) (1983). The ASPO report[8] reflects that 54% of the responding communities reported amortizing signs; 25% reported amortizing land and 17% reported amortizing junkyards. While these uses have greater visual and audible impacts upon neighboring uses than do other nonconformities, they are the ones least vulnerable to restrictions upon resumption after discontinuance, restoration after destruction by fire, flood or other fortuitous means and are seldom abandoned. Rathfopf, *supra* §51.09(1). Unless amortization is upheld as a proper exercise of the police power under the Fourteenth Amendment, these objectionable uses will never be eliminated.

C.

Also compelling the issuance of a writ of certiorari in this case is the fact that this Court has not heretofore addressed the substantial federal question raised by the decision of the Supreme Court of Indiana which, it should be added, is

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[7] *Scott, supra*, p. 8.

[8] *Ibid*, p. 8.

in direct conflict with the overwhelming weight of authority on the matter. Of the few states which have followed the minority view that amortization is *per se* invalid, all of them have rested on an adequate and independent state grounds and thus have evaded certiorari review. Compare, *Hoffman v. Kinealy*, (1965) Mo., 389 S.W.2d 745 (amortization constitutes taking of private property for public use without just compensation in violation of state constitutional provision); *City of Akron v. Chapman*, (1953) 160 Ohio St. 382, 116 N.E.2d 697 (amortization impinges upon the due process clauses of both the state and federal constitutions); *United Advertising Corp. v. Borough of Raritan*, (1952) 11 N.J. 144, 93 A.2d 362 (amortization is contrary to zoning statute expressly permitting the continuance of nonconforming uses); *DeMull v. City of Lowell*, (1962) 368 Mich. 242, 118 N.W.2d 232 (state statute prohibits termination of nonconforming uses by amortization).

By contrast, Indiana is the first and only state to have invalidated amortization on federal due process grounds alone. This posture places it squarely in conflict with the prevailing view which sanctions the technique of amortization as a valid exercise of the police power under the Due Process clause of the Fourteenth Amendment, provided that on balance the public benefit outweighs the private injury and the time allowed for termination is reasonable.

See, *Art Neon Co. v. City and County of Denver*, (10th Cir. 1973) 488 F.2d 118; *City of Los Angeles v. Gage*, (1954) 127 Cal.App.2d 442, 274 P.2d 34; *Board of Supervisors of Cerro Gordo County v. Miller*, (1969) Ia., 170 N.W.2d 358; *Spurgeon v. Board of Commissioners of Shawnee County*, (1957) 181 Kan. 1008, 317 P.2d 798; *State ex rel. Dema Realty Co. v. Jacoby*, (1929) 168 La. 752, 123 So. 314; *Inhabitants of the Town of Boothbay v. National Advertising*

Company, (1975) Me., 347 A.2d 419; *Wolf v. City of Omaha*, (1964) 177 Neb. 545, 129 N.W.2d 501; *Harbison v. City of Buffalo*, (1958) 4 N.Y.2d 553, 152 N.E.2d 42; *State v. Joyner*, (1975) 286 N.C. 366, 211 S.E.2d 320; *Rives v. City of Clarksville*, (1981) Tenn.App., 618 S.W.2d 502; and *Swain v. Board of Adjustment of City of University Park*, (1968) Tex.Civ.App., 433 S.W.2d 727.[9]

If the parameters of the police power under the Fourteenth Amendment are broad enough to sustain reasonable amortization provisions in California, Texas, Kansas, New York and numerous other localities, then *a fortiori* they are inclusive enough to uphold such ordinances in Indiana as well. Surely the reach of the federal Due Process clause does not stop at the Indiana border. The authority of municipalities to employ amortization as a means for phasing out nonconforming uses and the attendant rights of the owners of nonconformities to due process of law should not be dependent upon the state or circuit in which the question arises. Such a result would be inimical to the notion of due process.

D.

The Petitioner herein, Ripley County Area Plan Commission, has cited several reasons in support of its assertion that this case is "cert-worthy". Among them is the

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[9] Various other courts have upheld amortization ordinances, if reasonable, without isolating the specific federal or state constitutional provision involved, upon incantation of the phrase "due process of law". *Standard Oil Co. v. City of Tallahassee*, (5th Cir. 1950) 183 F.2d 410; *Naegele Outdoor Advertising Company of Minnesota v. Village of Minnetonka*, (1968) 281 Minn. 492, 162 N.W.2d 206; *LaChapelle v. Town of Goffstown*, (1967) 107 N.H. 485, 225 A.2d 624; *Beals v. County of Douglas*, (1977) Nev., 560 P.2d 1373; *State v. Sanguinetti*, (1982) Vt., 449 A.2d 922; *City of Seattle v. Martin*, (1959) 54 Wash.2d 541, 342 P.2d 602.

fact that amortization is crucial to the efforts of municipalities seeking to terminate nonconforming uses.

> "The issue of the amortization of nonconforming uses is of significant consequence to local planning and zoning efforts in this state. An absolute prohibition against amortization will defeat the purpose of zoning efforts, for the gradual elimination of a use not compatible with the public welfare could not be accomplished."[10]

Equally important in persuading the court to grant certiorari review is the fact that this case calls into question the validity, under the United States Constitution, of a zoning technique common to many communities nationwide. A definitive opinion on this subject would lay to rest any lingering doubts regarding the constitutionality of this zoning device and resolve the split of authority which has arisen by virtue of the Indiana Supreme Court's decision in this case.

[10] Hunter, J: dissent, App. A-14.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Indiana.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE

SUPREME COURT OF INDIANA

RALPH D. AILES and ELIZABETH J. AILES,	)	
Appellants,	)	
v.	)	
DECATUR COUNTY AREA PLANNING COMMISSION and Decatur County Board of Zoning Appeals,	)	Supreme Court No. 583 S 171 Consolidated Cause No. 1-381 A 98 in the Court of Appeals
Appellees,	)	
and	)	
MELVIN T. ROUSE,	)	
Appellant,	)	
v.	)	
RIPLEY COUNTY AREA PLAN COMMISSION,	)	
Appellee.	)	

APPEALS FROM THE DECATUR CIRCUIT COURT
and the RIPLEY CIRCUIT COURT
The Honorable John A. Westhafer, Judge
The Honorable Henry A. Pictor, Judge
Cause No. C-79-137
Cause No. C-77-128

PIVARNIK, J.

This cause comes to us on a petition to transfer from the Fourth District Court of Appeals. Transfer is sought by Appellants in the Court of Appeals, who were Defendants in the trial court. Appeal was consolidated challenging the constitutionality of amortization provisions in the zoning ordinances of two different counties, both of which require the discontinuance of pre-existing lawful non-conforming uses of real estate upon the expiration of a specific number of years. After injunctions were issued against Appellants Ralph and Elizabeth Ailes and Rouse, enjoining them from operating junkyards at their residences, both the Aileses and Rouse brought independent Motions in their own counties for relief from their respective judgments pursuant to Ind. R. Tr. P. 60(B), alleging the applicable amortization provision constituted an unconstitutional taking of property and an unreasonable exercise of police power. Both Motions were denied and the parties appealed, raising only the constitutional issue for appellate consideration. Transfer is granted, the opinion of the Court of Appeals is vacated, and the judgments of the trial courts are reversed.

Both appeals were brought on agreed statements of the records and the facts in both cases are undisputed. The Court of Appeals properly set out the facts pertinent to the issue which we adopt for purposes of this opinion as follows:

"FACTS

Both appeals come before us on agreed statements of the records, pursuant to Ind. Rules of Procedure, Appellate Rule 7.3. The facts in both causes are undisputed. The Aileses' real estate, on which they also resided, had been used as a junkyard and automobile wrecking yard since 1967 or 1968, before the effective date of the Decatur County zoning ordinance enacted in 1975 and continued uninterrupted until the date of suit in 1979. In 1975, Decatur County zoned an area, which included the Aileses' residence, for one and two family residences only and prohibited the maintenance of junkyards (Footnote omitted) or automobile wrecking yards (Footnote omitted) within that district. The Aileses do not dispute the use of their real estate in the current manner is proscribed by the ordinance, and the trial court so found. (Footnote omitted.) The trial court also found the use of the real estate constituted a lawful nonconforming use which should have been abated within three years of the ordinance's enactment in 1975 under the following amortization provisions:

'3.23. Any nonconforming use of land not involving any structure,... may be continued for a period not to exceed three years after enactment of the ordinance, whereupon such nonconforming use shall cease or structure shall be removed.

3.24. Any building or structure devoted to a nonconforming use with a fair market value of less than $500.00 as determined by the Board of Appeals, may be continued for a period not to exceed three years after enactment of the ordinance, whereupon such nonconforming use shall cease and thereafter such building or structure shall be removed or changed to a conforming use.'

On September 18, 1979 the trial court therefore issued an injunction against the use of the property as

a junkyard and ordered removal of the offending materials. The Aileses moved for relief from the judgment challenging the constitutionality of the amortization provisions. The trial court overruled their motion. On appeal, both parties state there is no issue of fact but only an issue of law which questions whether an amortization provision eliminating a 'non-conforming, pre-existing, uninterrupted, otherwise lawful use' of real estate is a taking of property without due process and an unreasonable exercise of police power.

Rouse's appeal presents a similar record. Rouse began using his residential real estate as a junkyard in approximately 1953. In 1970, Ripley County zoned the district including Rouse's real estate for medium density single and two-family residences, where junkyards (Footnote omitted) are not permitted. Rouse does not challenge the trial court's finding that he is maintaining a junkyard in violation of the ordinance, nor does he challenge the applicability of the following amortization provision contained in Section 3.5 of the ordinance:

> 'The lawful use of a building or premises existing at the time of passage of the ordinance, may be continued although such use does not conform to all the provisions of this ordinance or amendments to this ordinance except as hereinafter provided.
>
> ....
>
> (g) Any nonconforming open use of land shall be discontinued within (5) years from the date of passage of this ordinance.' [Footnote omitted].

On August 18, 1978 the trial court issued an injunction ordering removal of all junked equipment and automobiles from Rouse's real estate. Rouse moved for relief from the judgment alleging the amortization provision was unconstitutional. The trial court's

subsequent finding that the challenged provision was not an unconstitutional taking of property without due process of law is the only question raised in Rouse's appeal."

Appellant-Petitioners Ailes and Rouse challenge the respective amortization provisions as an unconstitutional taking of property and as an unreasonable exercise of police power. Petitioners are correct on this issue.

The precise issue of amortization as a means of phasing out non-conforming uses by zoning regulation has not been directly addressed in this jurisdiction. In approving less drastic measures of phasing out, however, strong inferences have been made that such a direct approach would not be acceptable. *Metropolitan Development Commission of Marion County v. Marianos*, (1980) ___ Ind. ___, 408 N.E.2d 1267; *Misner v. Presdorf*, (1981) ___ Ind.___, 421 N.E.2d 684, *transfer denied*; *Jacobs v. Mishawaka Board of Zoning Appeals*, (1979) ___ Ind.App. ___, 395 N.E.2d 834, *trans. denied*; *Dandy Co., Inc. v. Civil City of South Bend*, (1980) ___ Ind.App. ___, 401 N.E.2d 1380. Typically the provisions of the zoning ordinances upheld in those cases and generally approved by this Court and the Court of Appeals allowed a use which was non-conforming to the area to continue with the limitations that exercise of the use could not be expanded or increased beyond its status at the time of the passage of the ordinance, exercise of the use could not be reinstated after there was an abandonment of it in the area by the original user or one successor to it, destruction of the enclosure housing the exercise of the use such as destruction by fire, authorized replacement again to the level existing at the time of enactment of the ordinance and in some cases replacement of that particular non-conforming use with another non-conforming use that fell in the same class of uses as the original non-conforming use. By this method there was a

gradual phasing out of non-conforming uses without taking from the user the right to exercise a use that was lawful prior to the enactment of the ordinance so long as all of the conditions and limitations were met. *Metropolitan Development Commission, supra; Jacobs, supra; Misner, supra.*

In *Jacobs*, the Court of Appeals, in discussing the methods of phasing out non-conforming uses by municipalities in their zoning ordinances, stated:

> "Zoning ordinances contain provisions exempting existing non-conforming uses from the use restrictions because the right of a municipality to enact zoning restrictions is subject to the vested property interest acquired prior to the enactment of the zoning ordinances. An ordinance prohibiting any continuation of an existing lawful use within a zoned area is unconstitutional as a taking of property without due process of law and as an unreasonable exercise of police power."

Jacobs, ___ Ind. at___, 395 N.E.2d at 836.

As the Court of Appeals pointed out in *Jacobs*, a number of jurisdictions have taken this position and found amortization provisions in zoning ordinances respecting non-conforming uses are unconstitutional *per se*.

The Court of Appeals points out in the instant case that though there is a divergence of opinion among the various jurisdictions, the greater weight of authority supports the use of amortization provisions if they are reasonable, usually weighing the private loss against the public gain in each case. *See Annot.*, 22 ALR 3rd 1134 §§3 & 4 (1968 and Supp. 1981) and cases cited therein. The factors to be considered in those approving amortization appear to be the length of time given to phase out the use, the type of business or endeavor exercised, and the nature of the

business or use and its relationship to the neighborhood or area involved. From a constitutional standpoint, it does not appear that a resolution of any of these factors can make that reasonable which is basically and from the outset unreasonable. We must bear in mind that we are dealing with a use of a person's private property that was continuing and lawful at the time of the passage of the ordinance. It became unlawful only by reason of the provisions of the ordinance. The nature of the business, its relationship to the rest of the area, the method in which it is run, its potential success or failure based on the income or lack thereof, are irrelevant considering the narrow issue drawn in the facts before us.

It was suggested in both of the cases involving the Aileses and Rouse, that their premises were nothing more than junk piles, that it was questionable if any business was conducted there since there was little evidence of any income to them, that they represented a blight on the community and the loss to them would be negligible compared to the gain of the public in general and more particularly their neighbors. These factors could not be considered in this issue. These actions in both cases of the Aileses and Rouse were brought only for enjoining zoning ordinance violations and were based solely upon allegations that Appellants' use of their real estate was in violation of the provisions of the zoning ordinances. There is no allegation nor implication in these causes that the real estate of either of the Appellant-Petitioners here constituted a nuisance. As Petitioners point out, the complaints contain absolutely no allegations that Appellants' use of their real estate jeopardize the health and safety of their neighbors and therefore constituted a nuisance or in any other manner constituted a nuisance. If either community of Decatur County or Ripley County has evidence that the use of the properties of the Aileses and

Rouse constitute a nuisance, a blight, or a danger to the health and safety of the community, they have open to them the remedy of pursuing enjoining of petitioners' activities as a nuisance. That issue is not before us here.

As we consistently have held, it is permissible for a community to provide in its zoning ordinances that the lawful use of land that exists at the time of the passage of the ordinance is no longer permissible under the terms of the ordinance, may be continued subject to the provisions that no non-conforming use shall be enlarged or increased or extended to occupy a greater area of land than was occupied at the effective date or adoption of the ordinance or amendment, that once abandoned, the use may not be reinstated or the use may be replaced by one of the same or similar nature and not more restrictive than the use employed. We hold, however, that an ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as the taking of property without due process of law and an unreasonable exercise of the police power. The opinion of the Court of Appeals is vacated, and the judgments of the trial courts are reversed with instructions to the trial courts to vacate the respective injunctions and orders against the petitioners and enter judgment in favor of these petitioners.

Givan, C.J., and Prentice, J., concur.
DeBruler, J., concurs in result with separate opinion.
Hunter, J., dissents with opinion.

IN THE
SUPREME COURT OF INDIANA

RALPH D. AILES and ELIZABETH J. AILES,	)	
Appellants,	)	
v.	)	
DECATUR COUNTY AREA PLANNING COMMISSION and DECATUR COUNTY BOARD OF ZONING APPEALS,	)	No. 583 S 171
Appellees,	)	
MELVIN T. ROUSE,	)	
Appellant,	)	
v.	)	
RIPLEY COUNTY AREA PLAN COMMISSION,	)	
Appellee.	)	

ON PETITION TO TRANSFER

DEBRULER, J.—Concurring in Result

The first step in determining the constitutionality of a statute or ordinance is to extract its meaning, purpose and

scope. *Board of Com'rs. v. Kokomo City Plan Commission*, (1975) 263 Ind. 282, 330 N.E.2d 92. In pertinent part, these ordinances seek to subject a particular type of established non-conforming use to extinguishment by amortization. The Decatur County ordinance applies the amortization technique to uses of "land not involving any structure" and to "Any building or structure . . . with a fair market value of less than $500.00". The Ripley County ordinance applies it to "open use of land" and within the terminology utilized, "land" is either hopelessly ambiguous or it refers to an area without related and appurtenant buildings. At the outset, I am led to the conclusion that neither ordinance is intended to subject an established non-conforming use of a yard surrounding a private residence to extinguishment by amortization. Accordingly, I would vote to reverse these judgments on this legal basis, and await a more appropriate occasion to deal with the constitutional issues, even though the parties may have limited the appeal to them.

IN THE
SUPREME COURT OF INDIANA

RALPH D. AILES and ELIZABETH J. AILES,	)	
Appellants, (Defendants below),	)	
v.	)	
DECATUR COUNTY AREA PLANNING COMMISSION and DECATUR COUNTY BOARD OF ZONING APPEALS,	)	Supreme Court No. 583 S 171
Appellees, (Plaintiffs below),	)	
and	)	Consolidated Cause No. 1-381 A 98
MELVIN T. ROUSE,	)	in the Court of Appeals
Appellant, (Defendant below),	)	
v.	)	
RIPLEY COUNTY AREA PLAN COMMISSION,	)	
Appellee. (Plaintiff below).	)	

APPEAL FROM THE DECATUR CUICUIT COURT
THE HONORABLE JOHN A. WESTHAFER, JUDGE
and
APPEAL FROM THE RIPLEY CIRCUIT COURT
THE HONORABLE HENRY A. PICTOR, JUDGE

HUNTER, J.—Dissenting.

I must respectfully dissent from the majority opinion. The ultimate purpose of zoning regulations is to promote the public's health, safety, convenience, and welfare by regulating the uses of private property within certain areas. This has consistently been recognized as a legitimate and constitutionally valid exercise of the state's police power. *Field v. Area Plan Commission of Grant County, Ind.*, (1981) ___ Ind.App. ___, 421 N.E.2d 1132. There must necessarily be some private loss whenever regulations involving the general public welfare are enacted. But courts have almost universally adopted a balancing approach by weighing the private loss against the public gain in each individual case and have consistently upheld restrictive requirements when they have proven to be *reasonable* under the particular facts and circumstances of the case. *Bird v. Delaware Muncie Metropolitan Plan Commission*, (1981) ___ Ind.App. ___, 416 N.E.2d 482.

While zoning legislation may lower the property value or otherwise create hardship for an individual property owner, this loss must be measured against the public's gain, and the individual owner is compensated by sharing in the general public benefit of living in a reasonably regulated society. The decision to terminate nonconforming uses, and the method to be used, should be made by the appropriate legislative body and include a balancing of the loss by the

individual with the public good sought to be achieved. Our standard on review only needs to be the test of "reasonableness." *See Art Neon Co. v. City and County of Denver*, (10th Cir. 1973) 488 F.2d 118, and cases cited therein.

The issue of the amortization of nonconforming uses is of significant consequence to local planning and zoning efforts in this state. An absolute prohibition against amortization will defeat the purpose of zoning efforts, for the gradual elimination of a use not compatible with the public welfare could not be accomplished. I feel that it is obvious that the constitutionality of any fixed period for amortization in each case would depend upon the nature of the nonconforming use, the extent of the private loss, and the amount of time necessary to liquidate the investment in the nonconforming use. These factors must be balanced in each case with the public benefit that will be gained, as measured by the impact of the cessation of the nonconforming use on the environment, health, safety, and welfare of the public. This balancing method is the only way to accord respect to the competing public and private interests.

The case of *Jacobs v. Mishawaka Board of Zoning Appeals*, (1979) ___ Ind.App. ___, 395 N.E.2d 834, is not controlling on the issue of amortization of nonconforming uses as that case dealt with an alleged *expansion* of a nonconforming use; it did not involve an amortization period. While it may be true as pointed out in that case that an ordinance prohibiting *any* continuation of an existing lawful use is unconstitutional, amortization is a method for the *gradual* elimination of the nonconforming use and does not constitute an immediate restriction to a vested property interest. The rapidity of the elimination of the nonconforming use would depend upon the length of the period of amortization and if the period were too short in

duration to accommodate the property owner, the period would be unconstitutional as applied and the individual's due process rights are thus protected. Amortization periods are not always "rapid" and come in many different lengths and types. The case-by-case balancing method of review is as necessary in amortization cases as it is in other areas of zoning problems.

I agree with Judge Miller's reasoning and conclusions in the instant case:

> "[T]he greater weight of authority supports the use of amortization provisions if they are reasonable, usually weighing the private loss against the public gain in each case. *See Annot.*, 22 A.L.R. 3d 1134 §§ 3, 4 (1968 & Supp. 1981).
>
> "We find this latter approach to be the more well-reasoned view under the circumstances before us. The absolute prohibition of amortization may unnecessarily impede the legitimate goal of zoning to eliminate nonconforming uses in the public interest.
>
> * * *
>
> "In theory, amortization provides a grace period in which the user may continue the nonconforming use, amortize the investment and make future plans. The amortization period may well provide the user with more time than necessary to realize the economic life of the nonconforming use. This factor is not dispositive, however, and may have no applicability to the open use of land, as opposed to the use of a structure. Several elements must therefore be considered in determining the reasonableness of a given amortization provision as applied to particular circumstances. For example, the public benefit may be determined by considering the offensiveness of the nonconforming use in view of the surrounding

neighborhood; the private loss may be measured by the value of the nonconforming use, the damages incurred by compliance including the hardship imposed on the user, and the length of time allowed for amortization. *Annot.*, 22 A.L.R. 3d 1134, *supra*.

"In the record before us, there is no evidence indicating the degree, if any, of hardship or loss to the landowners which will be occasioned by compliance with the zoning ordinances.

* * *

"Neither the Aileses nor Rouse present a record of any evidence on these factors which would allow this Court to balance the interests involved and determine the reasonableness of the amortization provisions as applied to their property. On the other hand, we are confronted with the inherently debilitating effects of maintaining a junkyard in a residential neighborhood and the resultant legitimate interests of the state in eliminating nonconforming uses for the public welfare. We find the amortization provisions at issue in the instant case are not unconstitutional per se.

"We do not hold all amortization provisions are constitutional per se or as applied under all circumstances. Even an amortization provision valid on its face may be found unconstitutional as applied to a particular parcel of real estate after weighing the pertinent factors, some of which are enumerated above. The rule of reasonableness must prevail, considering the public gain versus the private loss. As in all zoning cases, each case must be decided on its own facts. *Nelson v. Board of Zoning Appeals of Indianapolis*, (1959) 240 Ind. 212, 162 N.E.2d 449; *Jacobs v. Mishawaka Board of Zoning Appeals, supra*." *Ailes v. Decatur County Area Planning Com'n*, (1982) ___ Ind.App. ___, 437 N.E.2d 1375, 1379-80 [footnotes omitted].

I would deny transfer and affirm the judgment of the trial court.

APPENDIX B

STATE OF INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

MARJORIE H. O'LAUGHLIN, CLERK
217 STATE HOUSE
INDIANAPOLIS, 46204

TELEPHONE 232-1930

No. 583 S 171

Ralph D. Ailes, et al v.
Decatur County Area Planning Comm.

You are hereby notified that the Supreme Court has on this day denied "Appellee's Petition for Rehearing" of Ripley County Area Plan Commission. Givan, C. J. Hunter, J., would grant. Denied "Petition for Rehearing" of Decatur County Area Plan Commission the Decatur County Board of Zoning Appeals. Givan, C. J., Hunter, J. would grant. Granted Metropolitan Development Commission of Marion County, Indiana's "Motion for Leave to File Brief of An Amicus Curiae". Given, C. J., Prentice, J., would deny.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

Witness my name and the seal of said Court, this 4th day of August, 1983.

/s/ *Marjorie H. O'Laughlin*
Clerk Supreme Court and Court of Appeals

August 3, 1983

No. 583 S 171

Jack R. Shields, Batesville
William O. Smith & George R. Watts, Greensburg
Stephen T. Taylor, Versailles
John P. Ryan, Indpls.
Sue Ann Hartig, Evansville
Charles A. Ruchman, Gary
Bruce O. Boxberger, Ft. Wayne

APPENDIX C

RALPH D. AILES and ELIZABETH J. AILES,
Appellants (Defendants Below),

v.

DECATUR COUNTY AREA PLANNING COMMISSION and Decatur County Board of Zoning Appeals,
Appellees (Plaintiffs Below).

and

MELVIN T. ROUSE,
Appellant (Defendant Below),

v.

RIPLEY COUNTY AREA PLAN COMMISSION,
Appellee (Plaintiff Below).

No. 1-381A98

Court of Appeals of Indiana,
Fourth District.

July 28, 1982.

MILLER, Presiding Judge.

This is a consolidated appeal challenging the constitutionality of amortization provisions in the zoning ordinances of two different counties, both of which require the discontinuance of pre-existing lawful nonconforming uses of real estate upon the expiration of a specific number of years. After injunctions were issued against appellants (Ralph and Elizabeth Ailes and Rouse) enjoining them from operating junkyards at their residences, both the Aileses and Rouse brought independent motions for relief from their respective judgments, pursuant to Ind. Rules of Procedure, Trial Rule 60(B), alleging the applicable amortization provision constituted an unconstitutional

taking of property and an unreasonable exercise of police power. Both motions were denied, and the parties appeal raising only the constitutional issue for our consideration.[1] We affirm.

FACTS

Both appeals come before us on agreed statements of the records, pursuant to Ind. Rules of Procedure, Appellate Rule 7.3. The facts in both causes are undisputed. The Aileses' real estate, on which they also resided, had been used as a junkyard and automobile wrecking yard since 1967 or 1968, before the effective date of the Decatur County zoning ordinance enacted in 1975 and continued uninterrupted until the date of suit in 1979. In 1975, Decatur County zoned an area, which included the Aileses' residence, for one and two family residences only and prohibited the maintenance of junkyards[2] or automobile

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[1] On appeal Rouse adopted the Aileses' brief. Each county planning commission filed a separate appellee's brief. Separate reply briefs were filed by Rouse and the Aileses.

[2] Section 1.18 of the Decatur County Comprehensive Area Plan and Zoning Ordinance of 1975 defines "junkyard" as: "An open area or fenced in enclosure, where used or second hand materials are bought, sold, exchanged, stored, baled, packed, disassembled or handled including but not limited to appliances, scrap iron and other metals, paper, rags, rubber tires, and bottles. A junk yard includes an automobile wrecking yard, but does not include uses established entirely within enclosed buildings." The Aileses' real estate includes a detached garage-like structure which the parties agree is in a state of disrepair and has a negligible fair market value. In its findings of fact, the trial court found the Aileses were storing the offending material both inside and outside this structure, and that the structure itself constituted junk. Although the Aileses raise an objection to this characterization of the "structure," we note the amortization provisions at issue also require discontinuance of prior nonconforming uses of structures as well as open land. See 3.24 of the Ordinance quoted infra.

wrecking yards[3] within that district. The Aileses do not dispute the use of their real estate in the current manner is proscribed by the ordinance, and the trial court so found.[4] The trial court also found the use of the real estate constituted a lawful nonconforming use which should have been abated within three years of the ordinance's enactment in 1975 under the following amortization provisions:

> "3.23. Any nonconforming use of land not involving any structure, . . . may be continued for a period not to exceed three years after enactment of the ordinance, whereupon such nonconforming use shall cease or structure shall be removed.
>
> 3.24. Any building or structure devoted to a nonconforming use with a fair market value of less than $500.00 as determined by the Board of Appeals, may be continued for a period not to exceed three years after enactment of the ordinance, whereupon such nonconforming use shall cease and thereafter such building or structure shall be removed or changed to a conforming use."

---

[3] Section 1.7 of the Ordinance defines an "automobile wrecking yard" as: "Any area where two or more motor vehicles, not in running condition, or parts thereof, are stored in the open and are not being restored to operation; or any land, building or structure used for the wrecking or storing of such motor vehicles, or parts thereof, not in running condition."

[4] The trial court specifically found: "Defendants are storing on their property, both out in the open and within a structure: (a) Two or more motor vehicles (including boats, vans, trucks, cars, and tractors), not in running condition, or parts thereof; (b) Various used and second hand materials, debris, junk, trash, engines and motors, barrels, parts of appliances, scrap metal, rags, broken bottles, garbage, salvaged items, waste materials, used tires, and other unsightly objects." There was no request in the record for specific findings of fact.

On September 18, 1979 the trial court therefore issued an injunction against the use of the property as a junkyard and ordered removal of the offending materials. The Aileses moved for relief from the judgment challenging the constitutionality of the amortization provisions. The trial court overruled their motion. On appeal, both parties state there is no issue of fact but only an issue of law which questions whether an amortization provision eliminating a "non-conforming, pre-existing, uninterrupted, otherwise lawful use" of real estate is a taking of property without due process and an unreasonable exercise of police power.

Rouse's appeal presents a similar record. Rouse began using his residential real estate as a junkyard in approximately 1953. In 1970, Ripley County zoned the district including Rouse's real estate for medium density single and two-family residences, where junkyards[5] are not permitted. Rouse does not challenge the trial court's finding that he is maintaining a junkyard in violation of the ordinance, nor does he challenge the applicability of the following amortization provision contained in Section 3.5 of the ordinance:

> "The lawful use of a building or premises existing at the time of passage of the ordinance, may be continued although such use does not conform to all the provisions of this ordinance or amendments to this ordinance except as hereinafter provided.

---

[5] The record does not contain a copy of the definition of "junkyard" under the Ripley County Zoning Ordinance-Master Plan Ordinance of 1970. However, in its statement of facts, the Ripley Commission asserts: "The Ordinance defines junkyard as a place usually outdoors, where waste or discarded used property other than organic matter is accumulated and/or stored and is or may be salvaged for reuse or resale, including but not limited to, one or more unlicensed or inoperable motor vehicles, or farm machinery or equipment of any kind." In his reply brief, Rouse adopted the Commission's statement of facts.

. . . .

(g) Any nonconforming open use of land shall be discontinued within (5) years from the date of passage of this ordinance."[6]

On August 8, 1978 the trial court issued an injunction ordering removal of all junked equipment and automobiles from Rouse's real estate. Rouse moved for relief from the judgment alleging the amortization provision was unconstitutional. The trial court's subsequent finding that the challenged provision was not an unconstitutional taking of property without due process of law is the only question raised in Rouse's appeal.

DECISION

The Aileses and Rouse challenge the respective amortization provision as an unconstitutional taking of property and as an unreasonable exercise of police power. It is well established, however, that reasonable zoning regulations are a proper exercise of police power and are not unconstitutional merely because they regulate the uses of private property. *Town of Homecroft v. Macbeth*, (1958) 238 Ind. 57, 148 N.E.2d 563; *Field v. Area Plan Commission of Grant County*, (1981) Ind.App., 421 N.E.2d 1132; *Metropolitan Board of Zoning Appeals v. Sheehan Construction Co.*, (1974) 160 Ind.App. 520, 313 N.E.2d 78. The ultimate purpose of zoning regulations is to confine certain classes of uses and structures to specific areas, *Jacobs v. Mishawaka Board of Zoning Appeals*, (1979) Ind.App., 395 N.E.2d 834, thereby insuring and promoting the public's health, safety, convenience and welfare. *Board of Zoning Appeals of New Albany v. Koehler*, (1963) 244 Ind.

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[6] There is no structure involved in Rouse's use of his property as a junkyard.

504, 194 N.E.2d 49. It is the express goal of zoning legislation to encourage enactment of zoning ordinances "to the end that highway systems be more carefully planned, that new communities grow only with adequate street, utility, health, educational and recreational facilities; that the needs of agriculture, industry, and business be recognized in future growth, [and] *that residential areas provide healthy surroundings for family life....*" (Emphasis added.) Ind.Code 18-7-4-1 *et seq.*, repealed by Acts 1974, P.L. 75, §3; 1978 P.L. 95, §4, 1979 P.L. 178 §164 and substantially reenacted at Ind.Code 36-7-4-201. To accomplish these objectives, a zoning regulation may control the use of land and structures in a particular locality, but it must be within the limitations imposed by statutory and constitutional provisions, and it must have a real and substantial relation to the public health, safety, or general welfare. *Field v. Area Plan Commission of Grant County, supra*, at 1138 quoting 30 I.L.E. *Zoning* §8 at 647 (1960); *accord* 101 C.J.S. *Zoning* §54 (1958).

In the instant case, we are specifically concerned with the zoning of residential areas and the regulation of prior nonconforming uses. It is well settled that zoning of family residential areas bears a substantial relationship to the public safety and general welfare. *Field v. Area Plan Commission of Grant County, supra*; *Antrim v. Hohlt*, (1952) 122 Ind.App. 681, 108 N.E.2d 197. Exclusion of commercial and industrial uses of land and structures in residential areas ensures the quiet of natural surroundings and vegetation, and decreases the risk of various annoyances from competing usages. *Antrim v. Hohlt, supra*. We have also previously recognized the inherent rationale for excluding junkyards specifically from residential zones:

> "[The maintenance of a junkyard in a residential area] may well destroy the value of [the] neighbors'

property, provide an attractive nuisance for neighborhood children, lure uninvited scavengers, provide cover and breeding grounds for rodents and insects, and generally constitute a threat to the health, safety and welfare of neighborhood residents."

Field v. Area Plan Commission of Grant County, supra, at 1139, fn. 6. Junked automobiles are particularly recognized as presenting a considerable health and safety hazard. As explained in *Lachapelle v. Goffstown*, (1967) 107 N.H. 485, 225 A.2d 624 (upholding an amortization provision applied to a junkyard in a residential zone), they tend to still have gasoline in their tanks, children are attracted to them, they may fall if disturbed and they tend to create neighborhood blight. Consequently, the state has a reasonable and legitimate interest in zoning areas for solely residential use and in excluding junkyards from residential areas. *Field v. Area Plan Commission of Grant County, supra*; *Antrim v. Hohlt, supra*.

Under many ordinances, however, proof of a prior nonconforming use[7] constitutes a defense to an action alleging a violation of a zoning ordinance. Generally, zoning ordinances have no retroactive effect and work no disturbance with existing property uses. *Dandy Co., Inc. v. Civil City of South Bend*, (1980) Ind.App., 401 N.E.2d 1380. Thus, the right of a municipality to enact zoning restrictions is subject to vested property interests. *Jacobs v. Mishawaka Board of Zoning Appeals, supra*, and consequently, as emphasized by the Aileses and Rouse, an ordinance prohibiting any continuation of a pre-existing

[7] A prior non-conforming use is defined as a use of premises which lawfully existed prior to the enactment of a zoning ordinance and which is allowed to continue after the ordinance's effective date although it does not comply with the use restrictions applicable in the area. *Jacobs v. Mishawaka Bd. of Zoning Appeals, supra*.

lawful use is unconstitutional as a taking of property without due process of law and as an unreasonable exercise of police power. *Id.*

Generally, however, nonconforming uses are not favored since they impede the attainment of the legitimate purpose of zoning ordinances to secure the gradual or eventual elimination of such uses, *Id.*; *Misner v. Presdorf*, (1981) Ind.App., 421 N.E.2d 684, and zoning ordinances routinely employ various methods to eliminate such uses, including the prohibition of resumption of the nonconforming use after abandonment or destruction of nonconforming structures, and the prohibition of alterations or expansion of nonconforming uses. *Jacobs v. Mishawaka Board of Zoning Appeals, supra*. E.g., *Fidelity Trust Co. v. Downing*, (1946) 224 Ind. 457, 68 N.E.2d 789 (dilapidated refreshment stand destroyed by fire could not be reconstructed); *Chizum v. Elkhart County Plan Commission*, (1970) 147 Ind.App. 691, 263 N.E.2d 654 (erection of lightpoles along dragstrip was an illegal extension of nonconforming use). These methods have withstood constitutional attack in view of the public interest. *See Misner v. Presdorf, supra* (where the Court found an ordinance prohibiting expansion of a nonconforming use was not an unconstitutional taking); 101 C.J.S. *Zoning* §63 (1958).

While amortization, the method used in the instant case to eliminate prior nonconforming uses upon the expiration of a specific period of time, has not been specifically challenged in this jurisdiction, it is, however, a method commonly employed in other jurisdictions. *See Annot.*, 22 A.L.R.3d 1134 (1968). There is a divergence of opinion among our sister states concerning the constitutionality of amortization provisions. Although a few states have concluded this method is unconstitutional *per se*, *e.g.*, *DeMull v. Lowell*, (1962) 368 Mich. 242, 118 N.W.2d 232;

Hoffman v. Kinealy, (1965) Mo., 389 S.W.2d 745; *United Advertising Corp. v. Raritan*, (1952) 11 N.J. 144, 93 A.2d 362; *Sun Oil Co. v. Upper Arlington*, (1977) 55 Ohio App.2d 27, 379 N.E.2d 266, the greater weight of authority supports the use of amortization provisions if they are reasonable, usually weighing the private loss against the public gain in each case. *See Annot.*, 22 A.L.R.3d 1134 §§ 3, 4 (1968 & Supp. 1981).

We find this latter approach to be the more well-reasoned view under the circumstances before us. The absolute prohibition of amortization may unnecessarily impede the legitimate goal of zoning to eliminate nonconforming uses in the public interest. As explained in *Lachappelle v. Goffstown*, *supra*:

> "We believe that the rigid approach taken by [those cases finding amortization unconstitutional per se] has a debilitating effect on effective zoning, unnecessarily restricts the police power and prevents the operation of a reasonable and flexible method of eliminating nonconforming uses in the public interest. It is impossible to treat this problem in the abstract or to apply the same time limitation to all nonconforming uses. However, this should not prevent reasonable attempts to discourage the continuation of nonconforming uses in the process of furthering an important public need without confiscatory damage to the landowner."

Id. at 488-89, 225 A.2d at 627.

In theory, amortization provides a grace period in which the user may continue the nonconforming use, amortize the investment and make future plans. The amortization period may well provide the user with more time than necessary to realize the economic life of the nonconforming use. This factor is not dispositive, however, and may have no applicability to the open use of land, as opposed to the use

of a structure. Several elements must therefore be considered in determining the reasonableness of a given amortization provision as applied to particular circumstances. For example, the public benefit may be determined by considering the offensiveness of the nonconforming use in view of the surrounding neighborhood; the private loss may be measured by the value of the nonconforming use, the damages incurred by compliance including the hardship imposed on the user, and the length of time allowed for amortization. *Annot.*, 22 A.L.R.3d 1134, *supra*.

In the record before us, there is no evidence indicating the degree, if any, of hardship or loss to the landowners which will be occasioned by compliance with the zoning ordinances.[8] A similar problem was presented in the *Board of Supervisors v. Miller*, (1969) Iowa, 170 N.W.2d 358, where an amortization provision requiring discontinuance of an automobile-wrecking yard within five years was found reasonable and a constitutional exercise of police power, in the absence of any evidence regarding the value or investment involved, or the extent of hardship invoked by compliance. *See also State v. Joyner*, (1974) 23 N.C.App. 27, 208 S.E.2d 233, where the court held the owner must show the loss occasioned by compliance and upheld a three year amortization applied to a salvage yard in the absence of such evidence. Neither the Aileses nor Rouse present a record of any evidence on these factors which would allow this Court to balance the interests involved and determine the reasonableness of the amortization provisions as applied to their property.[9] On the other hand, we are

[8] Indeed, the removal of the offending materials may well increase the value and marketability of their real estate as residential property.

[9] It does not appear that the Aileses or Rouse ever presented the issue directly to their zoning boards. Where a person seeks to challenge the constitutionality of a zoning ordinance as applied to their property, the issue must first be presented to the board of zoning appeals. E.g., *Town of Homecroft v. Macbeth*, *supra*; *Board of Zoning Appeals of New Albany v. Kuehler*, *supra*.

confronted with the inherently debilitating effects of maintaining a junkyard in a residential neighborhood and the resultant legitimate interests of the state in eliminating nonconforming uses for the public welfare. We find the amortization provisions at issue in the instant case are not unconstitutional *per se*.

We do not hold all amortization provisions are constitutional *per se* or as applied under all circumstances. Even an amortization provision valid on its face may be found unconstitutional as applied to a particular parcel of real estate after weighing the pertinent factors, some of which are enumerated above. The rule of reasonableness must prevail, considering the public gain versus the private loss. As in all zoning cases, each case must be decided on its own facts. *Nelson v. Board of Zoning Appeals of Indianapolis*, (1959) 240 Ind. 212, 162 N.E.2d 449; *Jacobs v. Mishawaka Board of Zoning Appeals, supra*.

The judgment of the trial court is affirmed.

CONOVER, J., concurs.

YOUNG, J., dissents with opinion.

YOUNG, Judge, dissenting.

I dissent.

The so-called "amortization" provision in the two ordinances is a taking of property without due process. Therefore, it is an unreasonable exercise of police power and unconstitutional *per se*. *See* e.g., *Hoffman v. Kinealy*, (1965) Mo., 389 S.W.2d 745; *Sun Oil Co. v. City of Upper Arlington*, (1977) 55 Ohio App.2d 27, 379 N.E.2d 266. The state and its cities and towns have a legitimate interest in the elimination of prior nonconforming uses. The method of elimination, however, must be reasonable. Here it is not reasonable. Any public gain realized by the use of amortization provisions is outweighed by the private loss. I would reverse.

APPENDIX D

STATE OF INDIANA	)	IN THE RIPLEY CIRCUIT
	)	COURT
	)SS:	
COUNTY OF RIPLEY	)	GENERAL TERM, 1978
RIPLEY COUNTY AREA PLAN COMMISSION,	)	
Plaintiff,	)	
VS.	)	CAUSE NO. C-77-128
MELVIN T. ROUSE,	)	
Defendant.	)	

INJUNCTION AND JUDGMENT

Evidence was presented in this Court on May 26, 1978. Defendant's attorney filed a Trial Brief and Plaintiff's attorney was given an opportunity to file one. His brief was filed on June 21, 1978. The Court having duly considered the evidence, arguments of counsel and briefs submitted now finds that Defendant, Melvin T. Rouse, is operating a junkyard on certain real estate owned by him in Ripley County, State of Indiana. The Court further finds that said real estate was originally zoned R-2 on June 15, 1970 and that said zoning classification remains unchanged to the present time. The Court now concludes that judgment should be for Plaintiff and that Defendant should remove his junkyard from said real estate.

IT IS THEREFORE ORDERED that Plaintiff have and recover judgment from Defendant. Costs are assessed against Defendant.

IT IS FURTHER ORDERED that Defendant be and he hereby is enjoined from operating and maintaining his junkyard on his real estate located in Franklin Township, Ripley County, Indiana, to-wit:

Part of the Southeast Quarter of Section 15, Township 8 North, Range 12 East, containing .90 of an acre, more or less.

ALSO, Part of the Southeast Fourth of the Southeast Quarter of Section 15, Town 8 North, Range 12 East, containing 51/100 acres, more or less.

ALSO, Part of the Southwest Fourth of the Southeast Quarter of Section 15, Town 8 North, Range 12 East, containing 1.91 acres, more or less.

IT IS THEREFORE ORDERED that Defendant commence the removal of junk automobiles and junk equipment immediately. He is hereby given a period of ninety (90) days in which to complete the removal of all of said junk automobiles and junk equipment.

SO ORDERED this 8th day of August, 1978.

/s/ *Henry A. Pictor*
Henry A. Pictor, Judge
Ripley Circuit Court

APPENDIX E

STATE OF INDIANA	)	IN THE RIPLEY CIRCUIT
	)	COURT
	)SS:	
COUNTY OF RIPLEY	)	GENERAL TERM, 1980
RIPLEY COUNTY AREA PLAN COMMISSION,	)	
Plaintiff,	)	
vs.	)	CAUSE NO. C-77-128
MELVIN T. ROUSE,	)	
Defendant.	)	

ORDER

Arguments were presented by the attorneys on September 18, 1980. The Court found that the Motion for Relief From Judgment should be considered in view of the fact that defendant asserted a change in the constitution rather than simply a change in the law. The Court further found that the Ripley County Zoning Ordinance as it applied to defendant's real estate in the present case is constitutional. The Court specifically found that no structures were involved in defendant's nonconforming use of his real estate.

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion for Relief From Judgment be and it is hereby overruled and denied.

SO ORDERED and dated this 18 day of September, 1980.

/s/ *Henry A. Pictor*
Henry A. Pictor, Judge
Ripley Circuit Court

Copy to: Johnson & Eaton
Jack Shields

APPENDIX F

STATE OF INDIANA	)	IN THE RIPLEY CIRCUIT COURT
	)	
	)SS:	
COUNTY OF RIPLEY	)	GENERAL TERM, 1981
RIPLEY COUNTY AREA PLAN COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CAUSE NO. C-77-128
	)	
MELVIN T. ROUSE,	)	
	)	
Defendant.	)	

ORDER ON MOTION TO CORRECT ERRORS

On August 8, 1978, this Court ORDERED an injunction. On September 13, 1980, defendant filed a Motion for Relief From Judgment. That motion was argued before the Court. At the argument the Court advised the attorneys that specific findings would be made by the Court. The Court's Order of September 18, 1980, failed to detail any such findings. On November 18, 1980, defendant filed a Motion to Correct Errors. As directed by the Court both plaintiff and defendant have filed proposed findings of fact.

The Court now concludes that the Order of September 18, 1980, should be corrected and that specific findings of fact should now be made. The Court now finds:

1. Defendant is now and, at all times relevant to the present suit, was the owner of the following described real estate in Franklin Township, Ripley County, Indiana.

> Part of the Southeast Quarter of Section Fifteen (15), Township Eight (8) North, Range Twelve (12) East, containing ninety hundreths (.90) of an acre, more or

less. ALSO, part of the Southeast Fourth of the Southeast Quarter of Section 15, Township 8 North, Range 12 East, containing fifty-one hundredths (.51) of an acre, more or less. ALSO, part of the Southwest Fourth of the Southeast Quarter of Section 15, Township 8 North, Range 12 East, containing one and ninety-one hundredths (1.91) acres, more or less.

2. On June 15th, 1970, the Ripley County Commissioners adopted the Unified Zoning Ordinance and master plan for Ripley County, and that at all times thereafter said Unified Zoning Ordinance has been in effect.

3. Pursuant to the Unified Zoning Ordinance hereinabove referred to, the defendant's real estate in classified as R-2.

4. Defendant's use of the real estate subject hereof as a junk yard began prior to the effective date of the Ripley County Zoning Ordinance of 1970.

5. Defendant's use of the real estate subject hereof as a junk yard, existed on the effective date of the Ripley County Zoning Ordinance of 1970.

6. Defendant's use of the real estate subject hereof as a junk yard, has continued uninterrupted since the effective date of the Ripley County Zoning Ordinance of 1970.

7. Said Section 3.5 of the Ripley County Zoning Ordinance of 1970, insofar as it attempts to terminate a legal nonconforming, preexisting use of real estate, and specifically the wording of said section, which reads as follows:

> "The lawful use of a building or premises, existing at the time of passage of the ordinance, may be continued although such use does not conform to all the provisions of this ordinance or amendments to this ordinance except as hereinafter provided."...

"(g) any nonconforming open use of the land shall be discontinued within five (5) years from the date of passage of this ordinance."

is constitutional in its application to the use by defendant of his real estate.

8. No structures of buildings ever were or are now involved in defendant's nonconforming use of his real estate.

The Court now concludes as a matter of law that no relief should be granted from this Court's judgment of August 8, 1978.

IT IS THEREFORE SO ORDERED AND ADJUDGED. Defendant's Motion for Relief From Judgment is hereby again overruled and denied.

SO ORDERED and dated this 15th day of April, 1981.

/s/ Henry A. Pictor
Henry A. Pictor, Judge
Ripley Circuit Court

Copy to: Stephen Taylor
Jack Shields